IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

B.W., a minor, et al. **v.** **POWELL et al.**	**Case No. 09-cv-0286**
CONWAY et al. **v.** **CONAHAN et al.**	**Case No. 09-cv-0291**
H.T., through & with her next friend & mother, L.T., et al. **v.** **CIAVARELLA et al.**	**Case No. 09-cv-0357**
HUMANIK **v.** **CIAVARELLA et al.**	**Case No. 09-cv-0630** **The Honorable A. Richard Caputo**

DEFENDANT LUZERNE COUNTY'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS ALL CLAIMS AGAINST IT BY ALL PLAINTIFFS

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Defendant County of Luzerne ("Luzerne County") hereby respectfully submits this Memorandum of Law in support of its Motion to Dismiss.

I. INTRODUCTION

This Court has already found that the claims asserted against Luzerne County by Class Plaintiffs and the Individual Plaintiffs (collectively, "Plaintiffs") are futile. Accordingly, this Court must dismiss Luzerne County for the reasons set forth in its November 20, 2009 Memorandum and Order (Doc.335) and its March 1, 2010 Memorandum and Order (Doc.411). Plaintiffs have not identified a Luzerne County policy-maker with final authority for purposes of their §1983 claims. All of the Plaintiffs' Complaints cannot overcome this fundamental shortcoming.

Additionally, Plaintiffs cannot allege any facts to establish a pattern, policy, practice, or custom of Luzerne County that caused the alleged constitutional deprivations. This Court must dismiss Luzerne County for the reasons set forth below, and for the reasons more fully set forth in Luzerne County's September 28, 2009 Memorandum Of Law In Response To Plaintiffs' Motion For Leave To Amend The Master Complaint For Class Actions (Doc.297); its September 28, 2009 Memorandum Of Law In Response To Plaintiffs' Motion For Leave To Amend The Individual Plaintiffs' Master Amended Individual Complaint (Doc.298); its Brief in Opposition to the Class Plaintiffs' Second Motion for Leave

to Amend the Master Complaint (Doc.400); and the March 22, 2010 Joint Memorandum In Support Of Certain Defendants' Motions To Dismiss The Complaints Under Fed. R. Civ. P. 12(b)(6)(Doc.445); all of which are incorporated herein by reference pursuant to the authority granted by the Court's March 18, 2010 Order (Doc.422). [1]

Luzerne County discusses herein some of the arguments raised in its previous briefs in an abbreviated fashion for the Court's reference.

II. FACTUAL ALLEGATIONS

A. Master Complaint For Class Actions (Doc.136)

Class Plaintiffs' allegations concerning Luzerne County center on the actions of two former state court judges. However, only Judge Ciavarella is mentioned in Count VIII, which is the only count asserted against Luzerne County. Plaintiffs allege that Judge "Ciavarella instituted a custom, policy and practice in the Luzerne County juvenile court from 2003 through 2008 of denying plaintiffs their constitutional rights, including the right to counsel, the right against self-incrimination, and the right to be advised of the consequences of waiving counsel or entering a guilty plea…" (Doc.136, Class Action Compl., Count VIII, ¶781.) During the same time period, Plaintiffs contend that "county actors with responsibility for ensuring lawful and constitutional operation of the Luzerne

[1] Additionally, Luzerne County incorporates by reference its Motion to Dismiss on Immunity Grounds (Docs.218-19).

County juvenile court—including, but not limited to the Luzerne County District Attorney and the Luzerne County Public Defender—were routinely non-compliant" with federal and state law. (*Id.*,¶783.)

Plaintiffs allege that the unspecified "practices" of these county officials "deprived the plaintiffs of their constitutional rights" and were 'so permanent and well settled' as to have the 'force of law.'" (*Id.*,¶784.) Plaintiffs then allege that Judge Ciavarella's position as "the presiding judge in the Luzerne County juvenile court does not excuse county officials from complying [sic] with controlling" state and federal law. (*Id.*,¶785.) Plaintiffs allege that "the county's routine and persistent noncompliance with controlling" law amounts to "a policy of the county." (*Id.*,¶786.)

B. Individual Plaintiffs' Master Long Form Complaint (Doc.134)

In Count VI of the Individual Plaintiffs Master Complaint, the only Count asserted against Luzerne County, Plaintiffs allege substantive and procedural due process claims against Luzerne County. Plaintiffs' allegations against Luzerne County focus solely on the actions of state officials: the same two state court judges and also state probation officers. Plaintiffs allege that state court Judge Conahan acted as an "employee and/or agent and/or other representative of the County of Luzerne" when taking "actions regarding the funding of Luzerne County." (Individual Compl.,¶142.) When making funding decisions related to

the "Juvenile Detention Facility," Plaintiffs contend that Judge Conahan was "the person with final authority, in the County of Luzerne." (*Id.*,¶143.) Plaintiffs then allege that state court Judge Conahan conspired with non-state actors and that, therefore, somehow, Luzerne County is liable. (*Id.*,¶145.)

Plaintiffs also allege that state court Judge "Ciavarella instituted a custom, policy, and practice in the Luzerne County Juvenile Court from 2003 to 2008 of denying Juvenile Plaintiffs their constitutional rights[.]" (*Id.*,¶153.) According to Plaintiffs, these practices "were 'permanent and well settled' as to have the 'force of law.'" (*Id.*,¶154.)

Additionally, Plaintiffs allege that state court probation department employees "Brulo, and/or Michael Loughney, were the individuals with final authority for the County of Luzerne regarding juvenile probation recommendations made by the County Department of Probation. Therefore, these action[s] represent the 'policy' of the County of Luzerne and the County of Luzerne is liable under…§1983..." (*Id.*,¶147.) As with the state court judges, Plaintiffs allege that the state probation officials conspired with private parties and that such a conspiracy somehow results in liability to Luzerne County. (*Id.*,¶¶148-50.)

Plaintiffs also allege that Luzerne County's consistent non-compliance with federal and state law constitutes a "custom" for purposes of §1983. (Am. Compl.,¶155.) However, the Individual Plaintiffs do not identify any Luzerne

County officials who allegedly did so, because all of the individuals identified in Count VI are state officials—not county officials—because the state court system is a creature of the state as a matter of law.

III. STATEMENT OF QUESTION INVOLVED

Should Luzerne County be dismissed when—as this Court has already held—Plaintiffs cannot assert any claim against it as a matter of law?

SUGGESTED ANSWER: Yes.

IV. ARGUMENT

Plaintiffs have repeatedly tried to assert a viable and legally cognizable claim against Luzerne County. This Court has already found that the claims asserted against Luzerne County by Plaintiffs are futile in its November 20, 2009 Memorandum and Order (Doc.335) and in its March 1, 2010 Memorandum and Order (Doc.411).

Having failed to more clearly articulate a claim against Luzerne County, Plaintiffs are left with their original and insufficient allegations. Under any interpretation of the facts alleged, Plaintiffs cannot plead a claim that states a cause of action upon which relief can be granted against Luzerne County. Accordingly, this Court must dismiss Plaintiffs' Complaints with prejudice.

A. PLAINTIFFS' CLAIMS AGAINST LUZERNE COUNTY MUST BE DISMISSED PURSUANT TO THE STANDARDS OF 12(b)(6)

To avoid dismissal pursuant to Rule 12(b)(6), a plaintiff must aver "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A plaintiff's obligation to provide the grounds for his entitlement to relief requires more than a legal conclusion, and a formulaic recitation of the elements of a cause of action will not suffice. *Twombly*, 550 U.S. at 554; *Phillips v. Allegheny*, 515 F.3d 224, 231 (3dCir.,2008). "[A] court need not credit a complaint's 'bald assertions' or 'legal conclusions' when deciding a motion to dismiss." *Morse v. Lower Merion School Dist.*, 515 F.3d 224, 906 (3dCir.,1997)(citations omitted). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, __ U.S.__, 129 S. Ct. 1937, 1949 (2009). This standard "calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of [the claim]." *Twombly*, 550 U.S. at 556.

While all well-pleaded facts, as distinguished from conclusory allegations, must be taken as true, "a court need not credit a complaint's 'bald assertions' or 'legal conclusions' when deciding a motion to dismiss." *Morse v. Lower Merion School Dist.*, 132 F.3d 902, 906 (3dCir.,1997)(citations omitted). Additionally, the court need not accept factual allegations if they are patently absurd, *i.e.* their

"factual impossibility may be shown from the face of the pleadings." *Twombly*, 550 U.S. at 561. The Court is also **not** required to assume that the plaintiff can prove facts that are **not** alleged in the Complaint. *Evancho v. Fisher*, 423 F.3d 347, 354 (3dCir.,2005).

Although Plaintiffs' Complaints contain lengthy recitations of facts concerning the proceedings against them, and the harm they allegedly suffered by the actions of other defendants, they are conspicuously silent about any actionable conduct by Luzerne County. The failure to set forth the actions allegedly taken by a party in a complaint that purportedly led to a violation of the plaintiff's civil rights clearly warrants dismissal. *See Breslin v. City and County of Philadelphia*, 92 F.R.D. 764 (E.D.Pa.,1981)(dismissing complaint that contained no factual or legal allegations against certain defendants). "It is, of course, well established that a defendant in a civil rights case cannot be held responsible for a constitutional violation which he or she neither participated in or approved." *C.H. ex. Rel. Z.H. v. Olivia*, 226 F.3d 198, 210-202 (3dCir.,2000), *cert. denied*, 533 U.S. 915 (2001).

Indeed, "[t]he omission of a defendant's name from the material allegations of a complaint justifies dismissal of the Complaint against that defendant." *Whittington v. Vaughn*, 289 F. Supp. 2d 621, 628 (E.D.Pa.,2003). In *Whittington*, the Court dismissed certain defendants from a civil rights action because the complaint failed to allege that those defendants had any personal involvement in

the wrongful conduct at issue. *Id*. *See also Dolceamore v. Beard*, 2006WL1548857, *2 (M.D.Pa.,2006).

Plaintiffs are required to set forth facts demonstrating Luzerne County's direct involvement in the alleged misconduct that form the basis of their claims. They have failed to do so. Moreover, to the extent Plaintiffs are attempting to assert a civil rights claim based on the doctrine of *respondeat superior*, a civil rights claim cannot be premised on *respondeat superior*. *Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3rd Cir. 1988). Therefore, Plaintiffs' claims against Luzerne County must be dismissed with prejudice.

B. PLAINTIFFS' CLAIMS AGAINST LUZERNE COUNTY MUST BE DISMISSED PURSUANT TO THE LAW OF THE CASE

This Court has already found that the claims asserted against Luzerne County by Plaintiffs are futile. Accordingly, this Court must dismiss Luzerne County for the reasons set forth in its November 20, 2009 Memorandum and Order (Doc.335) and its March 1, 2010 Memorandum and Order (Doc.411).

The law of the case doctrine requires dismissal of Luzerne County. *See Casey v. Planned Parenthood of Southeastern Pa.*, 14 F.3d 848, 856 n. 11 (3d Cir.,1994) (citing Charles A. Wright et al., 18 Federal Rules and Procedure §4478 (1981)) ("Other law of the case rules apply to subsequent rulings by the same judge in the same case or a closely related one, to rulings by different judges at the same level, or to the consequences of the failure to preserve an issue for appeal.").

See also McLaughlin v. Rose Tree Media Sch. Dist., 52 F.Supp.2d 484, 490 (E.D.Pa.,1999).

The law of the case doctrine is applicable to, *inter alia*, subsequent rulings by the same judge. *McLaughlin*, 52 F. Supp. 2d at 490. Under the law of the case doctrine, issues decided in earlier stages of the same litigation should not be reopened. *Id*. (citing *Agostini v. Felton*, 521 U.S. 203, 236 (1997)). "The law of the case rules have been developed to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit." *Casey*, 14 F.3d at 856 (quoting Charles A. Wright et al., 18 Federal Rules and Practice §4478 (1981)).

C. PLAINTIFFS HAVE NOT AND CANNOT PLEAD A §1983 CLAIM AGAINST LUZERNE COUNTY.

"A public entity such as [Luzerne] County may be held liable for the violation of a Constitutional right under 42 U.S.C. §1983 only when the alleged unconstitutional action executes or implements policy or a decision officially adopted or promulgated by those whose acts may fairly be said to represent official policy." Mar. 1, 2010 Order (Doc.411), at 10 (citing *Reitz v. County of Bucks*, 125 F.3d 139, 144 (3dCir.,1997)); *see also Monell v. City of New York Department of Social Services*, 436 U.S. 658 (1978). "[I]n the absence of an unconstitutional policy, a municipality's failure to properly train its employees and officers can create an actionable violation of a party's constitutional rights under §1983 . . .

where the failure to train amounts to deliberate indifference to the rights of persons with whom the municipal employees come into contact." Mar. 1, 2010 Order (Doc.411), at 10 (citing *Reitz*, 125 F.3d at 145)).

Plaintiffs' allegations fail to meet these standards. Indeed, Plaintiffs (1) fail to identify a final policy-maker for Luzerne County; (2) fail to adequately plead a policy, custom or practice of Luzerne County, (3) fail to plead that Luzerne County did not properly train its subordinates, and (4) fail to plead facts that any policy, practice, or custom directly caused the alleged constitutional violations and (5) fail to plead facts sufficient to establish the violation of their constitutional rights by Luzerne County. Accordingly, Plaintiffs have not pleaded a §1983 claim against Luzerne County and it must be dismissed as a party to this Action.

1. Plaintiffs Have Not Identified A Final Policy-Maker Of Luzerne County.

Plaintiffs must identify a policy-maker who exercises final policy-making authority for Luzerne County. In their Complaints, Plaintiffs merely allege that various state court actors were non-compliant with applicable laws. They identify the District Attorney, the Public Defender, state Probation Department employees Brulo and McLaughlin, and two former state court judges. As this Court has already held, none of these individuals can possibly subject Luzerne County to liability. Accordingly, this Court must dismiss Plaintiffs' claims for failing to identify a single county policy-maker that has the final policy-making authority

necessary to bind Luzerne County under *Monell* and its progeny.[2]

a. Court Of Common Pleas Judges Are State Judicial Officers And Do Not Make County Policy.

To the extent that Plaintiffs seek to impose liability against Luzerne County based on the actions of Defendants, Conahan and Ciavarella, Plaintiffs' allegations are unsustainable as a matter of law. As this Court has already recognized, Judges Conahan and Ciavarella are **state**—not **county**—actors. Accordingly, they cannot bind Luzerne County under *Monell* and its progeny.

The determination of the authority inherent in a government office and to what extent an official has final policymaking authority for a governmental entity is "dependent on the definition of the official's functions under relevant state law." *McMillian v. Monroe County, Alabama*, 520 U.S. 781, 786 (1997); *see also Haybarger v. Lawrence County Adult Probation and Parole*, 551 F.3d 193, 201 (3dCir.,2008)(reminding that this question "can be answered only after considering the provisions of state law that define the agency's character").

After conducting the *McMillian* analysis, this Court concluded that Judges Conahan and Ciavarella acted as state officials, not as county policy-makers. Nov. 20, 2009 Order (Doc.335), at 13-18. The allegations of Plaintiffs' Complaints, which are less specific than those that were rejected by this Court in its previous

[2] County Commissioners, who this Court concluded were final policy-makers but who are not identified in the Complaint, are discussed *infra* at Section IV.C.2.

Orders denying Plaintiffs' Motions to Amend, fail to alter the undeniable fact that these former judges were—at all relevant times—state actors. (*See* Class Action Compl.,¶¶778-786.) Specifically, Class Plaintiffs allege that Judge Ciavarella "instituted a custom, policy and practice" in the Luzerne County Courthouse that resulted in the denial of constitutional rights extending to juvenile prosecutions. (*Id.*,¶781.) Similarly, Individual Plaintiffs assert that Judges Conahan and Ciavarella were "acting as an employee and/or agent and/or other representative" of Luzerne County. (Ind. Compl. ¶¶142, 143.)

These allegations fail as a matter of law, because, as this Court recognized, the actions of the former judges were taken in their respective capacities as state officials. Nov. 20, 2009 Order (Doc. No. 335), at 13-18. A state court judge is not a policy-maker for a county as a matter of Pennsylvania law. *Haybarger v.*, 551 F.3d at 201 (citing Pa. Const. Art. V, §1); *Blake v. Papadakos*, 953 F.2d 68, 70 (3dCir.,1992); Pa. Const. Art. V, §§6(c), 10; 42 Pa.C.S. § 102 (2008); 42 Pa.C.S. § 301 (2008). Accordingly, Plaintiffs' claims against Luzerne County must be dismissed to the extent that such claims are premised on any actions, policies, customs, or practices of state court Judges Conahan and Civarella.

b. Probation Officers Are State Officials And Therefore Cannot Be County Policy-Makers

Next, this Court has already concluded that state probation officers are state officials and not final county policy-makers. Presented with this precise issue

when considering Plaintiffs' first Motion for Leave to Amend, this Court found the following:

> Similar to judges, when the Pennsylvania Constitution lists county officers, probation officers are not included in that list….Other courts who have considered this issue have found that probation officers, as an arm of the court, are more like judges as state actors than as county actors....While these cases are not directly on point as to the issue of *Monell* final policy-maker liability, they effectively demonstrate probation officers fall on the "state" side of the line as an arm of the court….Because Luzerne County may only be liable through the actions of their own final policy-makers, I find that for the purpose of these motions, [the state probation office officials] were not final policy-makers.

Nov. 20, 2009 Order (Doc. No. 335), at 18-19.

By statute, a probation officer only performs those duties **directed by the court.** 42 Pa.C.S.A. §6304. The Pennsylvania Juvenile Act establishes that the scope of employment of a probation officer is under the jurisdiction of the court. 42 Pa. C.S. §6304(a)(*e.g.*, "Make investigations, reports, and recommendations **to the court…**") (emphasis added).[3]

The Pennsylvania Legislature also established, as part of a unified state court system, that each court of common pleas in Pennsylvania is required to have a domestic relations section, "**which shall consist of such probation officers** and

[3] Also as set forth above, only the Pennsylvania Supreme Court has the authority under the Judicial Code to supervise or alter the duties, powers or authority of the President Judge, such as Defendant Conahan. *Blake*, 953 F.2d at 70.

other staff of the court as shall be assigned thereto." 42 Pa.C.S. §961 (emphasis added). *See also* 42 Pa.C.S. §6307(a)(4)(providing as part of the "Juvenile Act" that "All files and records of the court in a proceeding under this chapter are open to inspection only by:...(4) A court and **its** probation and other officials or professional staff...")(emphasis added). The Third Circuit has held that a county domestic relations section "is merely a **part** of the court of common pleas for that county and 'thus, *not* a county agency.'" *Haybarger, supra*, 551 F.3d at 201 (citing *Rogers v. Bucks County Domestic Relations Section*, 959 F.2d 1268, 1271 n.4 (3dCir.,1992)(emphasis added)).

As state statute and case law make clear, probation officers are court trained and supervised, and cannot make policy for a county or render a county liable based upon their acquiescence in the actions of state judges. *See Court of Common Pleas of Erie County v. Pa Human Relations Comm'n*, 546 Pa. 47, 682 A.2d 1246, 1247 (1996); *L.J.S. v. State Ethics Comm'n*, 744 A.2d 798 (Pa.Cmwlth,2000); *Ellenbogen v. City of Allegheny*, 479 Pa. 429, 388 A.2d 730 (1978). As Luzerne County does not train or supervise these employees and cannot remove them from office, *Antolik v. County of Erie*, 93 Pa. Cmwlth. 258, 501 A.2d 697, 265 (1985), their actions cannot lead to liability on the part of Luzerne County.

Plaintiffs' attempt to bring claims against Luzerne County using the acts or omissions of probation officials fail because these individuals are not county

officials and, consequently, can not serve as final policy-making authorities for purposes of *Monell*. *Id.*

c. District Attorneys Cannot Convert Judicial Procedures Into County Policies.

The United States Supreme Court has held that "the identification of policy-making officials is a question of state law." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124 (1988)(plurality). By statute, the District Attorney is responsible for supervising the employees of her Office. *See* 16 P.S. §1420. A county government has no power to supervise a district attorney. *League of Women Voters of Greater Pittsburgh v. Allegheny Cty.*, 819 A.2d 155, 157 (Pa.Commw.,2003).

As a matter of law, the District Attorneys, and their assistant district attorneys, were not final policy-makers for Luzerne County at the times relevant to this Complaint. *Tavenner v. Shaffer* 2008WL4861982, 3 (M.D.Pa., 2008); *Williams v. Fedor*, 69 F.Supp.2d 649, 659-661 (M.D.Pa.,1999). This Court has already recognized that Pennsylvania district attorneys enjoy "'dual or hybrid status sometimes as a state officer and sometimes as a county officer.'" November 20, 2009 Memorandum (Doc.335), at 20 (analyzing *McMillian*). This Court concluded that Pennsylvania district attorneys act on behalf of the Commonwealth of Pennsylvania when they act in their "prosecutorial" capacities, and they act on behalf of a particular county when acting in their "administrative" capacities (i.e.,

when making hiring, firing, and other related decisions). *Id.* at 20-21.

Class Plaintiffs allege that unidentified assistant district attorneys "were routinely non-compliant" with controlling federal and state law "regarding Plaintiffs' due process rights" in waiving counsel and entering guilty pleas. (Doc.136, Class Action Compl., Count VIII, ¶781-786.)[4] The Court has already held that:

> Allowing a defendant to plead guilty, however, is analogous to the clearly prosecutorial acts of negotiating a plea bargain; both deal with the prosecutor's discretion whether to accept a guilty plea for a given charged offense….The decision to accept a guilty plea, like the decision to plea bargain, is prosecutorial in nature. Such a decision is made in the state role of a prosecutor. There are also no allegations of a failure to manage a subordinate officer in an administrative capacity.

November 20, 2009 Memorandum (Doc.335), at 20-21.

Accordingly, because these unidentified assistant district attorneys were acting in their prosecutorial capacities, they were state officials at times relevant to Plaintiffs' allegations. Any claims based upon their actions or inactions must be dismissed.

d. <u>The Public Defender Is Not A County Policy-Maker.</u>

Public defenders exercise independent discretion by statute in undertaking

[4] These allegations fail to specify **any** action, relying instead on a single legal conclusion—that the District Attorney was "routinely non-compliant" with certain federal and state laws. *Id.* As a legal conclusion, this allegation warrants no deference. *See Twombly*, 544 U.S. at 554.

their representation. 16 Pa.C.S. §9960.1 et seq.. *See also Dauphin County Public Defenders Office v. Court of Common Pleas of Dauphin County*, 849 A.2d 1145, 1149-1150 (Pa.,2004). By common law, a county government has no power to supervise public defenders. *Sasinoski v. Cannon*, 36 D & C4th 88, 93 (C.P.Allegh.Cty.,1997). Indeed, "for purposes of §1983 liability, the public defender cannot even be fairly categorized as a state actor." Nov. 20, 2009 Memorandum at 23 (Doc.335) (citing *Polk County v. Dodson*, 454 U.S. 312, 325 (1981)).

2. Plaintiffs Fail To Identify Authorized Policies Or A Custom Under *Monell*.

Plaintiffs have not pleaded, and cannot ever plead, any facts to show Luzerne County's direct involvement or actual knowledge.[5] **Significantly, here there is no Luzerne County official who has been named as an individual defendant.**

Even if this Court finds that Plaintiffs have adequately identified a county policy-maker, which they have not, Plaintiffs Complaints fail to adequately identify a single policy, practice, or custom as required by *Monell*. To the contrary, Class Plaintiffs merely allege that unidentified "county actors" were "non-compliant" with certain laws and that such unspecified actions were "well-

[5] *See* Luzerne County's September 28, 2009 Memorandum Of Law In Response To Plaintiffs' Motion For Leave To Amend The Master Complaint For Class Actions (Doc.297), at 20-21.

settled" enough to carry the "force of law." Similarly, the Individual Plaintiffs allege that the actions of state court judges represents the "policy" of Luzerne County, without identifying what role Luzerne County actually played. (Individual Compl. ¶143.)

Luzerne County is a Pennsylvania county of the Third Class. *See* 16 P.S. §210(3). As such, it is governed by Pennsylvania's County Code. *See* 16 P.S. §102. The County Code vests a county's corporate power "in a board of county commissioners." 16 P.S. §203. The Commissioners possess only those powers that are expressly delegated to them by statute, under relevant provisions of the applicable County Code. *See Commonwealth v. Henderson*, 113 Pa. Super. 348, 349, 173 A. 868 (1934).

Pennsylvania is among the jurisdictions adopting "Dillon's Rule," which limits the powers of local government to those expressly granted by statute. *See Kline v. Harrisburg*, 362 Pa. 438, 443-44, 68 A.2d 182, 184-85 (1949); *In re Valley Deposit and Trust Co.*, 311 Pa. 498, 167 A. 42, 43 (1933); *See In re Borough of Ambridge*, 53 Pa. Commw. 251, 417 A.2d 291, 292 (1980).

There is no provision of The County Code that grants the Commissioners or Luzerne County the power to supervise or regulate the conduct of judicial officers or the District Attorney, or those of any other County Row Office. To the contrary, Pennsylvania's Constitution establishes the court system as a separate

branch of government. Pa. Const., Art. V. Only Pennsylvania's Supreme Court has the power to exercise general supervisory and administrative authority over all the courts. Const., Art. V, §10.

Under the separation of powers doctrine, a county government cannot infringe upon the court's authority and has no supervisory authority over the courts. *Kremer v. State Ethics Comm'n*, 503 Pa. 358, 361, 469 A.2d 593, 595 (1983). The President Judge (the positions held by both Judges Ciavarella and Conahan at times pleaded in the Complaints) is "the executive and administrative head of the court," who has the responsibility to "supervise the judicial business of the court, promulgate all administrative rules and regulations…" 42 Pa. C.S.A. §325(e)(1). Only the Supreme Court of Pennsylvania has the authority under the Judicial Code to supervise or alter the duties, powers or authority of the President Judge. *Blake v. Papadakos*, 953 F.2d 68, 70 (3dCir.,1992).

As the Juvenile Court Rules state, the state court judge has sole authority over the procedures in the courtroom and the judge could not have been acting on behalf of either Luzerne County, which was not a party to any of the juvenile proceedings, or the lawyers that appeared before the Court. Pa.R.Juv.P., 100, 101, 120, 121, 151, 152.

Thus, as a matter of law, Luzerne County could not authorize, adopt, promulgate or acquiesce to any state court room procedures or state court

proceedings.

Recognizing this shortcoming in their pleading, Plaintiffs sought to amend their Complaints, and in so doing, Plaintiffs proffered alternative theories of liability under *Monell*. Nevertheless, even if this Court broadly construes Plaintiffs' Complaints to include all of their subsequently proffered theories, Plaintiffs' claims fail as this Court has already rejected each theory raised by Plaintiffs in each permutation of their respective Complaints.

First, Plaintiffs argued that "by adopting the policy of having a private, instead of public juvenile detention facility, the Luzerne County Commissioners created the ability for this corruption scheme to succeed." Nov. 20, 2009 Order (Doc.335), at 26. The Court disagreed, finding that the "execution of the policy did not directly cause any of the constitutional failures in Ciavarella's courtroom." *Id.*

Next, Plaintiffs argued that excessive payments by Luzerne County to certain defendants provided funds that could have been used to bribe other defendants. *Id.* at 26. The Court rejected this baseless theory, finding that the "argument fails to demonstrate that the Luzerne County policy, namely the funding of a private facility, *directly inflicted* the constitutional harm." *Id.* at 26-27 (emphasis in original).

Finally, Plaintiffs argued that Luzerne County commissioners "were

deliberately indifferent to the actions of Ciavarella, and that their indifference cased the constitutional harms." *Id.* at 27. The Court again disagreed with Plaintiffs, finding instead that "[e]ven if the county wanted to stop the conduct, it had no ability to do so directly" because "Ciavarella was a state, not county, employee over whom the Luzerne County final policy-makers had no control." *Id.* at 28; *see also id.* at 30 (rejecting ratification argument for same reason, i.e., because Judge Conahan was state actor, not a subordinate County official).

Thus, even given the chance to expand upon their otherwise insufficient pleading, Plaintiffs "fail[ed] to allege a policy of Luzerne County which inflicted the constitutional harms under any of the" forgoing theories. *Id.* at 31.

3. Plaintiffs Cannot Plead Any Failure To Train Or Supervise Luzerne County Officials Or Employees So As To Amount To A Deliberate Indifference To Plaintiffs' Rights

To state a claim under §1983 based on the alleged failure to train, Plaintiff must plead and prove that (1) the failure to train amounted to a deliberate indifference to the rights of persons with whom Luzerne County officials come in contact and (2) Luzerne County's policy actually caused a constitutional injury *City of Canton v. Harris*, 489 U.S. 378, 389 (1989).[6] Here, Plaintiffs failed to

[6] In *City of Canton*, the Court made it clear that on remand the Plaintiff would have to identify a particular deficiency ***in the training program*** and prove that the identified deficiency was the actual cause of her constitutional injury. It would not be enough to establish that the particular officer was inadequately trained, or that there was negligent administration of an otherwise adequate program, or that the

plead that the Luzerne County Commissioners or any other final policy-maker for Luzerne County had notice of the need for additional training and failed to identify a training policy that was unconstitutional. Indeed, they pleaded that Luzerne County had no such knowledge because Defendants Ciavarella and Conahan concealed their scheme. (*E.g.*, Class Action Compl.,¶¶659-670; Ind. Pltfs. Master Cmplt at ¶75.) Accordingly, the Complaints contains no allegations to suggest that Plaintiffs intend to maintain a failure to train claim under *Monell*. *See* Nov. 20, 2009 Order (Doc. No. 335), at 10 (noting that Plaintiffs' proposed Amended Complaint, which added, but did not subtract allegations from the Complaint at issue here "ma[d]e no allegations about the failure to train municipal employees").

Even if this Court were to construe Plaintiffs' Complaints as raising a failure to train theory based on the District Attorney's failure to train assistant district attorneys, such a claim fails as a matter of law because, as this Court has already held, the District Attorney acted in his prosecutorial capacity at all relevant times. Relying on *Van de Kamp v. Goldstein*, __ U.S.__, 129 S. Ct. 855, 861-63, 172 L.Ed.2d 706 (2009), this Court reasoned that "training a prosecutor is more similar to a prosecutorial than administrative function," adding that "the instruction is on

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conduct resulting in the injury could have been avoided by more or better training. The Court noted that federal courts are not to become involved "in an endless exercise of second guessing municipal employee training programs." *City of Canton*, 489 U.S. 390-91 (1989). Here, there is no training program because counties do not train lawyers, judges or court personnel.

state prosecutorial conduct." Mar. 1, 2010 Order (Doc.411), at 11-12. Therefore, the Court found that "in making direct prosecutorial decisions in the courtroom, and in training subordinates to do the same, a district attorney is a state actor." *Id.* at 12. Accordingly, based on this Court's reasoning, to the extent that Plaintiffs' Complaints are construed as raising a failure to train claim, any such construction fails as a matter of law. *See Van de Kamp*, 129 S. Ct. at 861-63; *Hyatt v. County of Passaic*, 2009WL2055136, *2 (3dCir.,2009); *Whitfield v. City of Philadelphia*, 587 F.Supp.2d 657, 667 n.15 (E.D.Pa.,2008).

Additionally, Luzerne County cannot, as a matter of law, be held responsible for the failure to train assistant district attorneys because the Supreme Court of Pennsylvania—not any county—is the only entity charged with training attorneys in this Commonwealth. *See Kohlman v. Western Pa. Hospital*, 652 A.2d 849 (Pa.Super.Ct.,1994); Pa. Const. art. V, §10; Pa. B.A.R. 104; Pa.R.C.L.E. 102; 42 Pa.Con.Stat. §725(4)-(5). Consequently, even if the alleged lack of training could have been the direct cause of the constitutional harm—which it cannot—Luzerne County cannot serve as the target of a civil rights action, because it has no power to mandate or implement training of lawyers. Plaintiffs are attacking Luzerne County for failing to take action that, pursuant to the Pennsylvania Constitution, it has no

power to take.[7]

D. PLAINTIFFS FAIL TO ESTABLISH A CAUSAL CONNECTION.

Assuming, *arguendo*, that this Court could find that Plaintiffs have pleaded a policy or custom by Luzerne County, Plaintiffs fail to plead and identify a legally cognizable causal connection between any alleged failure to train and their injury.

Section 1983 does not allow liability against a government vicariously, or merely on the basis of a relationship with a tortfeasor. *Monell*, 436 U.S. at 690-95; *Jett v. Dallas Indp. Sch. Dist.*, 491 U.S. 701, 735 (1989). The touchstone of §1983 liability is personal participation. *Zatler v. Wainwright*, 802 F.2d 397, 401 (11thCir.,1986). In the absence of such participation, and in the case of the liability of a governmental entity, Plaintiffs must establish a clear causal connection between the conduct of a high level government official and the constitutional deprivation. *Rizzo v. Goode*, 423 U.S. 362, 371 (1976). Where there is no affirmative link between the actions giving rise to the alleged deprivation and a governmental plan or policy, Plaintiffs have failed to meet the requisites for a

[7] To state a failure to train claim Plaintiffs must also establish that the alleged failure was the "direct cause" of the constitutional harm and that the failure to train manifested a deliberate indifference to the constitutional rights of the aggrieved party. *See Board of County Commissioners of Bryan County v. Brown*, 520 U.S. 397 (1997) (requiring court to "carefully test the link between the policymaker's inadequate decision and the particular injury alleged"); *City of Canton*, 489 U.S. at 389. *See* Def.'s Resp. to Class Plaintiffs' Second Motion For Leave To Amend (Doc.400), at 20-29 (discussing Plaintiffs' inability to establish causation and deliberate indifference).

claim. *Id.*

The mere description of an act as "policy" or "procedure" does not meet the threshold for a §1983 claim. *Timko v. City of Hazelton*, 665 F.Supp. 1130, 1137 (M.D.Pa.,1986). **This is exactly what Plaintiffs have done in their Complaint.** Indeed, as noted earlier, Plaintiffs failed to plead how any identifiable County employees were inadequately trained or supervised. They failed to plead that any identifiable County employees participated in any alleged illegal activity. Plaintiffs also failed to identify any affirmative acts by any identifiable County employees, and they failed to plead any causal connection between it and any alleged harm. They fail to name any Luzerne County employee as a defendant.

For Luzerne County to be liable for a state actor's constitutional tort, the official action in question must be the "moving force behind the constitutional violation." *Sample v. Diecks*, 885 F.2d 1099, 1118 (3dCir.,1989)(*citing City of Canton v. Harris*, 489 U.S. 378, 389 (1989)). Here, Luzerne County had no participation in the process by which juveniles were sent to detention facilities and Plaintiffs do not plead facts to the contrary.

The detention facilities, by definition, are designated by the state court and approved by the state Department of Public Welfare. Pa.R.Juv.P. 120. Luzerne County was not a party to any of the juvenile proceedings in state court. Further, Luzerne County could not exercise any supervision over the procedures used in the

adjudications—the procedures alleged to have effectuated the constitutional deprivations, destroying any causal link between its actions and the injuries Plaintiffs are claiming here. *See Whitt v. Stephens County*, 529 F.3d 278, 284 (5thCir.,2008). Just as importantly, any alleged observations by assistant district attorneys and public defenders of Judge Ciavarella's courtroom procedures did not directly *cause him* to deprive Plaintiffs of their Constitutional rights. *See Polk County v. Dodson*, 454 U.S. 312, 326 (1981); *see also* Nov. 20, 2009 Order at 23 (Doc. No. 335).

To hold a county responsible for a state court judge's court room practices would lead to a decision "collapsing municipal liability…into respondeat superior liability" without requiring Plaintiffs to establish the link between the funding decision and the actual constitutional deprivations alleged.

E. PLAINTIFFS CANNOT OTHERWISE STATE A CLAIM AGAINST LUZERNE COUNTY UNDER 42 U.S.C. §1983

1. Plaintiffs Fail To State Claims Cognizable Under 42 U.S.C. §1983 Against Luzerne County

Plaintiffs cannot state a claim against Luzerne County under 42 U.S.C. §1983. *Heck v. Humphrey*, 512 U.S. 477, 483 (1994). "[A] plaintiff claiming malicious prosecution must be innocent of the crime charged in the underlying prosecution." *Hector v. Watt*, 235 F.3d 154, 156 (3d Cir. 2001). Plaintiffs conspicuously fail to plead the elements of malicious prosecution, including that

they are innocent of the crimes with which they were charged. They fail to plead that with representation by counsel, any one of them would have been sentenced differently. They fail to allege a compensable injury, fail to allege that they would not have received the same sentences, fines or costs by a different judge or absent the alleged conspiracy, and fail to allege that their sentences constituted something other than a "justified deprivation."

For these reasons, and for the reasons more fully set forth at Section III.B in the March 22, 2010 Joint Memorandum In Support Of Certain Defendants' Motions To Dismiss The Complaints Under Fed. R. Civ. P. 12(b)(6)(Doc.445), this Court must dismiss Luzerne County as a Defendant.

2. Plaintiffs Have Not Alleged Facts or Included Parties Sufficient to Sustain a §1983 Conspiracy Claim

Only the Individual Plaintiffs purport to assert a §1983 conspiracy claim against Luzerne County. Any such claim, however, is insufficient as a matter of law. Accordingly, it must be dismissed.

To recover on a claim for civil conspiracy under §1983, Plaintiffs must show "that two or more conspirators reached an agreement to deprive him or her of a constitutional right 'under color of law'." *Leer Elec., Inc. v. Pennsylvania Dept. of Labor*, 597 F.Supp.2d 470, 484 (M.D.Pa.,2009)(internal quotation omitted). "[M]ere allegations of a joint action or conspiracy do not demonstrate that the defendants acted under color of state law and are not sufficient to survive a motion

to dismiss." *Wallace v. Fed. Judge of U.S. Dist. Ct.*, 311 F.App'x. 524, 525 (3dCir., 2008) (internal citation omitted). Rather, "[t]o state a claim for conspiracy under § 1983, plaintiff must claim that, '[t]he private actor wrongfully influence[d] the state [actor's] decision...." *Panayotodes v. Rabenold*, 35 F.Supp.2d 411, 419 (E.D.Pa.,1999)(quoting *Spencer v. Steinman*, 968 F.Supp. 1011, 1020 (E.D.Pa.,1997)).

The only individuals identified by Plaintiffs, however, are **state**, not **county** officials. Accordingly, even assuming that the facts alleged are sufficient to meet this standard, Luzerne County was not a party to any such alleged agreement. In fact, all of the Plaintiffs allege that the conspiracy was kept secret from Luzerne County. (*E.g.*, Class Action Compl.,¶¶659-670; Ind. Pltfs. Master Cmplt at ¶75.) In fact, the Individual Plaintiffs themselves plead at ¶75 that the purpose of the alleged scheme was "to defraud and deprive the citizens of Luzerne County and of the Commonwealth of Pennsylvania of their right to the honest services of Defendants CONAHAN and CIAVARELLA…"

In order to establish a civil conspiracy under §1983, plaintiff must demonstrate (1) the existence of a conspiracy and (2) a deprivation of civil rights in furtherance of the conspiracy by a party to the conspiracy. *Jackson-Gilmore v. Dixon*, 2005WL3110991, *12 (E.D.Pa.,2005)(citations omitted). A conspiracy is a combination of two or more persons acting in concert to commit an unlawful or

criminal act or to do a lawful act by unlawful means or for an unlawful purpose. *Id.* The principal element of a conspiracy is an agreement between the parties to inflict a wrong against or injury upon another, and commit an overt act that results in damage. *Id.* Therefore, it is not enough that the end result of the parties' independent conduct caused plaintiff harm or even that the alleged perpetrators of the harm acted in conscious parallelism. *Id.* Rather, the alleged conspirators must have had a "meeting of the minds" and reached an understanding to achieve the conspiracy's objectives. *Id. See also Barstad v. Murray County*, 420 F.3d 880, 887 (8thCir.,2005).

A meeting of the minds requires at least two persons. *Barstad*, 420 F.3d at 887 The only persons identified by Plaintiffs as allegedly acting on behalf of Luzerne County are Judges Ciavarella and Conahan and non-defendants Brulo and Loughney. As this Court has already held, none of these persons are Luzerne County policy makers or officials. They are Commonwealth of Pennsylvania officials. *See* November 20, 2009 Memorandum and Order (Doc.335) and its March 1, 2010 Memorandum and Order (Doc.411). [8]

[8] In Pennsylvania, the elements of civil conspiracy are that two or more persons combined or agreed with intent to do an unlawful act or to do an otherwise lawful act by unlawful means. *Thompson Coal Co. v. Pike Coal Co.*, 488 Pa. 198, 211, 412 A.2d 466, 472 (1979). *See also Nuway Environmental Ltd. v. Upper Darby Tp.*, 2006WL212289 (E.D.Pa.,2006). Proof of malice, i.e., an intent to injure, is an essential part of a conspiracy cause of action, and this unlawful intent must also be without justification. *Thompson Coal*, 488 Pa. at 211, 412 A.2d at 472.

As set forth above, Luzerne County can only act through its Commissioners. **Significantly, Plaintiffs have not named as a defendant any individual Luzerne County official.** They certainly did not plead that any Luzerne County official acted outside the scope of his or her employment. *See Nuway Environmental Ltd. v. Upper Darby Tp.*, 2006WL212289, *7 n.17 (E.D.Pa.,2006); *Fred's Modern Contracting, Inc. v. Horsham Township,* 2004WL620060, *7 (E.D.Pa.,2004).

Moreover, even if they had pleaded that Luzerne County actors conspired with other individuals or entities, Luzerne County cannot be held liable without Plaintiffs pleading (and later establishing) that the conspiracy was the direct result of a pattern, policy, or custom instituted by Luzerne County. Plaintiffs have not even attempted to plead facts to suggest any "conspiracy" originated from a Luzerne County policy or practice (much less that such a practice "caused" the alleged conspiracy).

3. Plaintiffs Have Not Alleged Facts Sufficient to Assert A Retaliation Claim

Plaintiffs do no specifically allege any facts to suggest that they intend to raise a retaliation claim under §1983 against Luzerne County. To the contrary, fairly read, Plaintiffs' Complaints assert that the state court judges acted out of their own pecuniary interest. Thus, even if these individuals could bind Luzerne

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Furthermore, a conspiracy is not actionable until "some overt act is done in pursuance of the common purpose or design ... and actual legal damage results." *Id.*

County, which they cannot, their actions were not taken as a result of Plaintiffs invoking any protected right. A retaliation claim cannot exist absent a retaliatory act. *See Trautman v. County of Allegheny*, 2009 WL 3030215, *9-12 (W.D.Pa.2009)(granting judgment where Plaintiff could not establish that actions taken were retaliatory).[9] Accordingly, to the extent that Plaintiffs intended to raise a retaliation claim, such a claim fails and must be dismissed.

F. A COUNTY GOVERNMENT CANNOT BE HELD LIABLE FOR ALLEGED CONSTITUTIONAL DEPRIVATIONS IN A STATE JUDICIAL PROCEEDING AND WHERE STATE JUDICIAL OFFICERS THEMSELVES HAVE ABSOLUTE IMMUNITY.

As more fully set forth in Luzerne County's July 27, 2009 Brief concerning judicial immunity (Doc.No.218), Luzerne County cannot be held liable for the immune actions (or as here, alleged *inactions*) of judicial officers who themselves are immune. Judicial officers are immune from damage suits arising out of their official duties. *Stump v. Sparkman*, 435 U.S. 349, 359-360 (1978); *Figueroa v. Blackburn*, 208 F.3d 435, 440 (3dCir.,2000).

Here, Plaintiffs' claims against Luzerne County arise from actions

[9] Moreover, Plaintiffs—who have not named a single County employee (let alone a final policy-maker)—have not pleaded facts to suggest that any alleged retaliation was a custom, policy, or practice of Luzerne County. *See Monell, supra*. Further, even if Plaintiffs had identified a retaliatory act taken by a county policy-maker, Plaintiffs' claim still fails because Plaintiffs (as set forth above) have not pleaded facts sufficient to establish that their constitutional rights were violated. Without such a violation, their retaliation claim fails as a matter of law.

undertaken by the court or an officer of the court. Accordingly, "such claims cannot proceed against the County in its executive capacity." *Kelly v. County of Montgomery*, 2008 WL 3408123 *3 (E.D.Pa.,2008). Nothing alleged by Plaintiffs relates to the functions of county government or to any action of any county commissioner or any employee appointed or authorized by county governmental officials with authority to determine the outcome of the juvenile delinquency proceedings.

The Third Circuit takes a functional approach to the determination of this immunity: if an official "performed a function integral to the judicial process," absolute immunity from §1983 claims attaches. *Williams v. Consovoy*, 453 F.3d 173, 178 (3dCir.,2006). Furthermore, imposition of liability on a county on the basis of such attenuated claims would violate the cardinal rule against imposing liability for harms a municipality does not commit. *Monell*, 436 U.S. at 694-95.

V. CONCLUSION

For all the foregoing reasons, Plaintiffs' claims against Luzerne County, are without merit. Accordingly, this Court must dismiss with prejudice all claims asserted against Luzerne County.

Respectfully submitted,

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Dated: April 1, 2010

CERTIFICATE OF COMPLIANCE

I, Timothy T. Myers, Esquire hereby certify that this Brief complies with word limit allowed by the Court's March 18, 2010 Order (Doc.422). The Brief contains 7,436 words of text, excluding captions, tables and certifications, as counted by the word-processing software system used to prepare this Brief.

/s/ Timothy T. Myers
Timothy T. Myers

CERTIFICATE OF SERVICE

I, Timothy T. Myers, Esquire, hereby certify that on this date all counsel of record were served with the forgoing pursuant to the electronic service provisions of this Court. I further certify that the following were served by U. S. mail, first class, postage pre-paid.

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